

CUMULATIVE DIGEST

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§26-1

First Degree Murder

People v. Amigon, 239 Ill.2d 71, 940 N.E.2d 63 (2010)

The issue of the proximate cause of death is a question for the jury. The common-law year-and-a-day rule, under which murder charges were barred if the victim died more than a year and a day after the date of the offense, was abolished by the criminal code. The length of time between the offense and the victim's death is not determinative of whether defendant is liable for the murder based on the foreseeability of the death, even where the victim apparently recovers from the injuries.

A rational trier of fact could find that the shooting committed by defendant was the proximate cause of death. The victim had been shot in the neck, causing a spinal cord injury that left him capable of moving only his head and biceps. He died of community-acquired bacterial pneumonia five-and-a-half years after the shooting. In the interim between the shooting and his death, he attended college.

The medical examiner was unable to establish actual damage to the victim's immune system or the specific type of bacteria involved due to the removal of some of the victim's organs and a delay in the autopsy. But the medical examiner testified that the victim's injuries affected his lung function and compromised his immune system, making him susceptible to the infection that caused death. The cause of death was pneumonia due to quadriplegia due to a gunshot wound to the neck.

People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 (2008)

Under the "one good count" rule, a conviction on an indictment or information charging multiple types of murder is presumed to be for the most serious offense charged. Where the most serious offense charged was intentional murder, and the evidence was overwhelming on that charge, defendant was not prejudiced by an erroneous instruction that defendant could be convicted of felony murder predicated on an aggravated battery that was inherent in the first degree murder charge. (See also **JURY**, §32-4(c)(2)).

People v. Domagala, 2013 IL 113688 (No. 113688, 4/18/13)

Illinois courts have held that an intervening cause completely unrelated to the acts of the defendant will relieve the defendant of criminal responsibility for an offense. Gross negligence or intentional medical maltreatment constitutes such an intervening cause, and therefore may constitute a valid defense to a murder charge.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Colbert, 2013 IL App (1st) 112935 (No. 1-11-2935, 11/8/13)

1. A person commits the offense of felony murder when, without lawful justification, he causes a person's death while "attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3). Mob action consists of the use of force or violence disturbing the public peace by two or more persons acting together and without authority of law. 720 ILCS 5/25-1(a)(1). Mob action is not listed among the offenses classified as forcible felonies, but falls within the purview of the statute's catch-all clause of "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.

Felony murder is unique in that defendant need only have the intent to commit the

predicate forcible felony, rather than the intent to commit a knowing or intentional killing. This raises the concern that the State might use a felony murder charge to avoid the burden of proving a knowing or intentional killing and to eliminate the alternative of a second degree murder conviction. To address this concern, the Supreme Court adopted the rule that where the acts constituting the forcible felony arise from and are inherent in the act of murder itself, those acts cannot serve as the predicate felony for felony murder. To support a charge of felony murder, the predicate felony must have an independent motivation or purpose apart from the murder itself. Whether the forcible felony is inherent in the murder itself is determined by reviewing the factual context surrounding the murder.

2. Defendant was properly convicted of felony murder based on the predicate felony of mob action. Viewing the factual context surrounding the murder, the Appellate Court determined that defendant's conduct did not arise from and was not inherent in the murder. The evidence indicated that the defendant participated in the mob action with the independent felonious purpose of physically intimidating and harassing fellow students from a rival neighborhood, which escalated to the point where defendant and his codefendants struck the victim multiple times, causing his death.

3. The Appellate Court rejected the defendant's argument that the court should have instructed the jury that to convict of felony murder it had to find the acts comprising the predicate felony of mob action had an independent felonious purpose. The issue of whether a forcible felony can serve as a predicate felony to felony murder is a question of law for the trial judge based on an examination of whether the evidence is sufficient to show that the predicate felony has an independent felonious purpose apart from the murder itself.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

People v. Cowart, 2015 IL App (1st) 113085 (No. 1-11-3085, 2/9/15)

Under the common design rule of accountability, where two or more people engage in a common criminal design, any acts in furtherance of that common design are considered to be the acts of all the members, and they are all legally responsible for the consequences of those acts. The Appellate Court reversed defendant's conviction for first degree murder holding that there was no evidence that defendant or anyone he was accountable for under a theory of common design fired the shot that killed Lee, the deceased victim.

The evidence showed that a fight broke out at a large street party attended by 100 - 200 people. During the fight, which involved numerous individuals, defendant punched a woman in the face, and later fired shots at some of the women he was fighting with. Several men associated with defendant also fired shots at the women. Many other men at the party who were not associated with defendant had guns and fired shots.

At some point during the melee, Lee was shot in the back and killed. Several people were standing near Lee and fired guns, but the person who fired the fatal shot was never identified. The State's evidence thus showed that defendant and his associates shot at the group of women they were fighting with, but did not show that any of these shots hit Lee by accident.

To establish a common criminal design resulting in murder, however, the State had to prove that Lee's unknown shooter shared defendant's common design to shoot at the women, but instead shot Lee by accident. The State failed to show this and thus failed to prove that defendant was accountable for Lee's murder.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and “one-act, one-crime” ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

Defendant’s convictions for first degree murder and aggravated arson were affirmed. (Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Mars, 2012 IL App (2d) 110695 (No. 2-11-0695, modified 2/25/13)

When the State has shown the existence, through the act of the accused, of a sufficient cause of death, the death is presumed to have resulted from such act, unless it can be shown that the death was caused by a supervening act disconnected from any act of the accused. The injury inflicted by the accused need not be the sole or immediate cause of death in order to constitute the legal cause of death.

Once the State establishes a sufficient legal proximate cause of death through an act for which the defendant is responsible, a presumption arises that the death resulted from the culpable act of the defendant. The presumption can be rebutted by contrary evidence, such as that the sole cause of death was the intervening gross negligence of physicians. Gross negligence or intentional medical maltreatment constitutes a valid defense when it is disconnected from the culpable act of the defendant because the intervening conduct is abnormal and not reasonably foreseeable.

An intervening cause must be completely unrelated to the acts of the defendant to relieve the defendant of criminal liability. Therefore, for the defendant to show that the victim’s death was due to a supervening cause relieving him of responsibility, he must show that the victim’s medical treatment was grossly negligent and that the death was completely unrelated to any act of the defendant. The alleged act or omission of the victim’s physicians must be disconnected from the culpable act of the defendant.

The evidence at trial was that the cause of the victim’s death was sepsis due to necrotizing fasciitis resulting from an incised injury to the arm inflicted by the defendant. Even assuming that it amounted to gross medical negligence, any delay in treatment of that infection would not qualify as an supervening cause because, but for the wound inflicted by the defendant, the infection would not have entered the body. The legal chain of causation connecting the stab wound inflicted by the defendant to the victim’s ultimate death was unbroken.

(Defendant was represented by Assistant Defender Shawn O’Toole, Chicago.)

People v. Perry, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-1228, 3/31/11)

1. An instruction on the lesser-included offense of involuntary manslaughter is warranted when there is some credible evidence to support the instruction. Although not dispositive, certain factors are relevant to the decision whether to give the instruction: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, including the severity of the victim’s injuries; and (3) whether the

defendant used his bare fists or a weapon. Generally, an involuntary manslaughter instruction should not be given where the nature of the killing, demonstrated by either multiple wounds or the victim's defenselessness, shows that the defendant did not act recklessly.

The court did not err in refusing an involuntary manslaughter instruction even though the court instructed the jury on the definition of recklessness and allowed defense counsel to argue to the jury that defendant acted recklessly, rather than knowingly or intentionally. Defendant attacked the deceased with a group of eight or nine boys, severely beat the deceased for five minutes, punching and stomping on his head, even as he lay defenseless and motionless on the ground. Defendant also used a liquor bottle as a weapon. The court found that the severity and duration of the beating, resulting in 17 distinct injuries, belied defendant's argument that he would not necessarily have known of the severity of the injuries because they were internal, and thus he had no reason to suspect that they would be fatal.

2. The second paragraph of IPI Crim. 4th, No. 5.01B defines knowledge as conscious awareness that a result is practically certain to be caused by defendant's conduct. It is applicable where the offense is defined in terms of a prohibited result. A charge of first degree murder pursuant to 720 ILCS 5/9-1(a)(2) requires that defendant act with knowledge that his actions create a strong probability of death or great bodily harm to the deceased. Therefore, the second paragraph of 5.01B is applicable because the charge requires knowledge of the result of defendant's conduct.

The committee notes to 5.01B indicate that the committee took no position whether the definition should be routinely given absent a specific jury request. The Appellate Court interpreted this note to mean that "knowingly" has a plain meaning commonly understood by jurors. The jury made no specific request for an additional instruction indicating confusion about mental states, though it did inquire whether it could find defendant guilty of another charge, such as second degree murder. Therefore, the court did not abuse its discretion in refusing the defense request for the instruction. The court also found no error because the jury otherwise received correct definitional and issues instructions on first degree murder. In addition, any error was harmless because the jury returned a valid general verdict of guilty that could be presumed to be based on the intentional murder count.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Quevedo, 403 Ill.App.3d 282, 932 N.E.2d 642 (2d Dist. 2010)

720 ILCS 5/9-1(a)(2) provides that a person commits first degree murder if he performs the acts which cause death with knowledge that those acts "create a strong probability of death or great bodily harm." The court found that under §9-1(a)(2), the requisite mental state is knowledge that there is a strong probability of death *or* knowledge that there is a strong probability of great bodily harm. The State did not charge defendant improperly by alleging in one count that he acted with knowledge of the strong probability of death, and in a second count that he acted with knowledge of the strong probability of great bodily harm.

However, the court criticized the State for bringing two counts rather than one. "Deviating from the statute when drafting charging instruments is unnecessary and should be avoided."

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

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§26-2 Felony Murder

People v. Bailey, 2013 IL 113690 (No. 113690, 3/21/13)

Where specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, the trial court abuses its discretion when it refuses a request for specific verdict forms. Refusal of separate verdict forms is not harmless when it is not possible to determine from a general verdict that the jury actually found the defendant guilty of each count and this lack of specificity has adverse sentencing consequences for the defendant. The appropriate remedy in such a case is to interpret the general verdict as a finding that would result in the more favorable sentencing consequence for the defendant.

Defendant was charged with intentional, knowing, and felony murder. He elected to have the court determine his eligibility for a death sentence after the State announced its intention to seek the death penalty. At trial, the court refused defendant's request for separate verdict forms on felony murder. The jury returned a general verdict of guilty on the murder charges. The court sentenced defendant to natural life based on its finding that defendant was death eligible because the murder was committed in the course of an inherently violent felony while defendant acted with the intent to kill or knowledge that his acts created a strong probability of death or great bodily harm.

Relying on **Beck v. Alabama**, 447 U.S. 625 (1980), and **Bullington v. Missouri**, 451 U.S. 430 (1981), the Illinois Supreme Court concluded that where a jury in a capital case renders a verdict in the guilt phase that contradicts a fact necessary for a finding of eligibility at the sentencing phase, neither the jury nor the court can make an eligibility finding contradicting the jury's verdict. Therefore, if the jury in defendant's case had been given separate verdict forms and had acquitted defendant of intentional or knowing murder, the court would have been foreclosed from finding defendant death eligible because the jury's verdict would have negated an essential element of the death eligibility factor.

Because the defendant's request for separate verdict forms had sentencing consequences, the court abused its discretion in denying the request. The error is not harmless. Even though there is evidence that could support a finding that the murder was committed knowingly or intentionally, it cannot be ascertained from the jury's general verdict whether the jury actually found defendant guilty of intentional or knowing murder or only of felony murder. The general verdict must be interpreted as a verdict of guilty of felony murder only and as an acquittal of intentional and knowing murder. Because such a verdict foreclosed the court from finding defendant death eligible and sentencing him to natural life, the court vacated defendant's sentence and remanded for resentencing of defendant to a term of years.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 (2008)

Under the "one good count" rule, a conviction on an indictment or information charging multiple types of murder is presumed to be for the most serious offense charged. Where the most serious offense charged was intentional murder, and the evidence was overwhelming on that charge, defendant was not prejudiced by an erroneous instruction that defendant could be convicted of felony murder predicated on an aggravated battery that was inherent in the first degree murder charge. (See also **JURY**, §32-4(c)(2)).

People v. Davison, 236 Ill.2d 232, 923 N.E.2d 781 (2010) (No. 107091, 2/4/10)

1. Under **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001) and **People v.**

Pelt, 207 Ill.2d 434, 800 N.E.2d 1193 (2003), acts which are inherent in a murder cannot serve as the predicate for felony murder. Furthermore, the predicate for felony murder must have an “independent felonious purpose” that is separate from the murder. The **Morgan** and **Pelt** cases stem from a concern that because many murders are accompanied by violent acts and felony murder does not require proof of intent to kill, the State could unfairly obtain a first degree murder conviction for felony murder while eliminating both the possibility of a second degree murder conviction and the burden of proving an intentional or knowing murder.

2. Under the circumstances of this case, felony murder could be predicated on mob action. The court found that the acts constituting mob action were not inherent in the offense of murder and had an independent felonious purpose.

The evidence showed that defendant engaged in an altercation with the victim, during which he chased the victim and threw a bat. Defendant also stabbed the victim, but then retreated while three co-defendants repeatedly stabbed and struck the victim. Thus, the evidence showed that the defendant committed mob action by acting with other persons to use force or violence to disturb the public peace.

However, because the evidence showed that the victim died as a result of cumulative blood loss from 20 stab wounds inflicted by the defendant and his three co-defendants, rather than by any particular wound inflicted by the defendant alone, the conduct constituting mob action was not inherent in the murder itself. Furthermore, because defendant claimed that he did not intend to kill the decedent, the acts which constituted mob action had an independent felonious purpose from the acts which constituted murder. Under these circumstances, mob action was a permissible predicate for felony murder conviction.

Defendant’s conviction for felony murder predicated on mob action was affirmed.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 (1st Dist. 2010)

In **People v. Smith**, 233 Ill.2d 1, 906 N.E.2d 529 (2009), the Illinois Supreme Court found reversible error where the court refused defendant’s request for special verdict forms so it could be determined whether the jury found defendant guilty of intentional or knowing murder, or just felony murder, in which circumstance defendant could not be sentenced to an additional consecutive sentence for the underlying felony. The one-good-count rule, which allows a court to presume from a general verdict form that the jury convicted on all counts for which there was sufficient evidence, did not defeat defendant’s argument.

The Appellate Court concluded that **Smith** did not create a *sua sponte* duty on the part of the court to give special verdict forms absent a request. Nor did it disturb the vitality of the one-good-count rule. Where the defendant was charged with intentional, knowing, and felony murder, special verdict forms were not requested, and the jury returned a general verdict form, the one-good-count rule allowed the court to enter judgment on the intentional murder count and impose a separate consecutive sentence for the underlying felony.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and “one-act, one-crime” ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the

conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

Defendant's convictions for first degree murder and aggravated arson were affirmed. (Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Reed, 405 Ill.App.3d 279, 938 N.E.2d 199 (1st Dist. 2010)

Where a general verdict is delivered for a defendant charged with murder in multiple counts alleging intentional, knowing, and felony murder, the conviction is presumed to be for the most serious offense – intentional murder. Under **People v. Smith**, 233 Ill.2d 1, 906 N.E.2d 529 (2009), however, a general verdict form cannot be presumed to be a finding of intentional murder when the trial court refused a request for separate verdict forms, there was a basis in the evidence for the request, and there are sentencing ramifications of convictions on separate counts. Under such circumstances, the appropriate remedy is to interpret the general verdict as a conviction for felony murder.

Here, defendant was charged with two counts of felony murder based on the predicate felonies of armed robbery and residential burglary. Because the trial court refused a request for specific verdict forms, the general verdict must be interpreted as a verdict on felony murder. Furthermore, because a defendant may not be convicted of both felony murder and the underlying predicate, defendant's convictions for armed robbery and residential burglary were reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Schmidt, 392 Ill.App.3d 689, ___ N.E.2d ___ (1st Dist. 2009)

1. A conviction for felony murder requires that the homicide occur during a "forcible felony" other than second degree murder. 720 ILCS 5/9-1(a)(3). Aggravated battery is a forcible felony if the offense "results in great bodily harm or permanent disability or disfigurement" 720 ILCS 5/2-8.

Where defendant was not charged with "great bodily harm" aggravated battery, but was charged on three alternate theories for aggravated battery against an officer (i.e., use of a deadly weapon (a vehicle which struck the officer's arm), the battery of a police officer engaged in official duties, and battery on a public way), the State conceded that the aggravated battery involving the officer did not result in great bodily harm, disability or disfigurement.

However, the prosecution argued that the felony murder charge was saved by the residual clause of the "forcible felony" statute, which provides that felony murder can be predicated on any non-specified felony "which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. The Appellate Court rejected this argument, finding that the legislature's decision to specifically include one form of aggravated battery as a forcible felony excludes those forms of aggravated battery which are not enumerated.

The court noted that before 1990, all aggravated batteries were clarified as "forcible felonies." However, a legislative amendment passed that year added the limiting language set forth above. "[W]e agree with defendant that by enacting the 1990 amendment, the legislature expressed its intent to limit the number and types of aggravated batteries that qualify as forcible felonies."

2. The court also reversed aggravated battery convictions based on injuries to four bystanders who were struck by the stolen SUV defendant was driving. The court found that

defendant's conduct was reckless and not "within the purview of the felony murder statute."
(Defendant was represented by Assistant Defender Christopher Buckley, Chicago.)
(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Walker, 2012 IL App (2d) 110288 (No. 2-11-0288, 12/31/12)

1. Generally, a party which desires a specific instruction must offer that instruction and ask that the trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

2. The court concluded that no error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The court found that the trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as "specialized" as No. 7.15A but which states that the prosecution has the burden to prove that the defendant's acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent's refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel's theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

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§26-3

Attempt Murder

People v. Anderson, 2012 IL App (1st) 103288 (No. 1-10-3288, 8/24/12)

1. The sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence so that the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence. Jury

instructions should not be misleading or confusing, and their correctness depends on whether ordinary persons acting as jurors would fail to understand them. Defendant must show that the claimed instructional error created a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.

2. Under Supreme Court Rule 451(c), claims of error related to substantial defects in jury instructions are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect, or plain error, when it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the trial. Defendant need not prove that the error in the instruction actually misled the jury.

Plain error arises in two circumstances: (1) where the evidence is closely balanced, or (2) where the flaw in the instruction is grave or so serious that it denies the defendant a substantial right and undermines the integrity of the judicial process. Where there is error in a close case, courts err on the side of fairness, so as not to convict an innocent person.

3. Defendant was charged with first-degree murder of one person and attempt murder of another person. The attempt-murder instruction did not name the victim. It informed the jury that it could find defendant guilty of attempting to murder “an individual.”

4. The Appellate Court found that it was probable that the ordinary juror would not understand that the subject of the attempt-murder instruction was only the alleged victim of the attempt murder, rather than the murder victim. Even though the court read the indictment to the jury at the beginning of trial and the State correctly identified the subject of the attempt-murder charge for the jury in closing argument, the jury was instructed that the indictment and closing arguments were not to be considered as evidence against the defendant. Defense counsel’s argument never addressed to whom the attempt-murder instruction applied.

5. The defective instruction was plain error because the evidence on the attempt-murder charge was closely balanced. The alleged victim of the attempt murder testified that he saw defendant commit the murder and that he heard more shots fired after that shooting, but he did not know in which direction they were fired as he ran to his car and fled from the scene. There were no bullet holes in his car. Defendant’s companion made a statement that defendant shot at “another person,” but he did not identify that person as the alleged attempt-murder victim, and he recanted this statement at trial. Therefore, the defendant may have been convicted of attempt murder based on the error in the instruction rather than the evidence.

The Appellate Court reversed defendant’s conviction for attempt murder and remanded for a new trial.

Garcia, J., dissented in part on the ground that the evidence on the attempt-murder charge was so lacking that a retrial on that charge would violate defendant’s constitutional right against double jeopardy.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

People v. Brown, 2015 IL App (1st) 131873 (No. 1-13-1873, 5/29/15)

1. The offense of attempt is committed where, with intent to commit a specific offense, an individual performs any act which constitutes a substantial step toward the commission of that offense. To prove attempt murder, the State must establish beyond a reasonable doubt that the defendant acted with specific intent to kill. Intent can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon,

or other matters from which intent to kill may be inferred.

2. The court concluded that even viewing the evidence in a light most favorable to the State, there was insufficient evidence to prove beyond a reasonable doubt that defendant intended to kill his live-in girlfriend. The defendant cut the girlfriend four times in the back with a knife or other sharp instrument, but there was no evidence of any struggle before or after the attack or of threats by the defendant toward the complainant. Furthermore, the lacerations were superficial and not life threatening. In addition, when the complainant left the apartment, the defendant did not attempt to pursue her or cause any further injury. Finally, the complainant testified only that she felt “punching” and “pressure” on her back and did not know that she had been cut until she felt something moist running down her back.

Although the complainant suffered serious injuries that could have resulted in permanent scarring, not every assault involving serious bodily injury necessarily supports an inference that the assailant intended to kill. Defendant’s conviction for attempt first degree murder was reversed and the cause remanded for re-sentencing on the remaining counts.

(Defendant was represented by Assistant Defender Tonya Joy Reedy, Chicago.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second.

On appeal, defendant argued that the jury’s verdict of second degree murder showed that he was acting in imperfect self-defense when he shot the two men, and since he shot both men at the same time with no change in his mental state, he could not have had the requisite intent to commit attempt first degree murder. The Appellate Court rejected this argument.

Once the State has proven the elements of first degree murder, the burden shifts to the defendant to prove by a preponderance of the evidence a mitigating factor, such as imperfect self defense, that will mitigate the offense to second degree murder. A defendant acts in imperfect self defense where he actually but unreasonably believes that he is acting in self-defense. If the defendant carries his burden, he will be convicted of second degree rather than first degree murder.

There is, however, no offense of attempt second degree murder in Illinois. **People v. Lopez**, 166 Ill. 2d 441 (1995). Even though the jury’s verdict on second degree murder showed that it found defendant acted in imperfect self defense, the jury could not have been instructed on and could not have found defendant guilty of attempt second degree murder. The jury’s verdict thus does not invalidate the attempt conviction.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Smith, 2012 IL App (1st) 102354 (No. 1-10-2354, 9/28/12)

Attempt first degree murder is generally a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill. App. 3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of some indication that the legislature intended otherwise, the firearm enhancements of subsections (B), (C) and (D) do not apply to the offense of attempt murder of a peace officer.

Thus, where the defendant was convicted of attempt murder of a police officer, the trial court properly applied the 20-year firearm sentencing enhancement for discharging a firearm to the defendant's enhanced 35-year enhanced sentence for attempt murder of a peace officer.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

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§26-4

Second Degree Murder (Voluntary Manslaughter)

§26-4(a)

Generally

Note: The offense of Voluntary Manslaughter was abolished by PA 84-1450 (eff. July 1, 1987). Voluntary manslaughter was replaced by Second Degree Murder, which is defined essentially the same but which places the burden of proof on defendant to prove that he is guilty of that offense instead of First Degree Murder.

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second.

On appeal, defendant argued that the jury's verdict of second degree murder showed that he was acting in imperfect self-defense when he shot the two men, and since he shot both men at the same time with no change in his mental state, he could not have had the requisite intent to commit attempt first degree murder. The Appellate Court rejected this argument.

Once the State has proven the elements of first degree murder, the burden shifts to the defendant to prove by a preponderance of the evidence a mitigating factor, such as imperfect self defense, that will mitigate the offense to second degree murder. A defendant acts in imperfect self defense where he actually but unreasonably believes that he is acting in self-defense. If the defendant carries his burden, he will be convicted of second degree rather than first degree murder.

There is, however, no offense of attempt second degree murder in Illinois. **People v. Lopez**, 166 Ill. 2d 441 (1995). Even though the jury's verdict on second degree murder showed that it found defendant acted in imperfect self defense, the jury could not have been instructed on and could not have found defendant guilty of attempt second degree murder. The jury's verdict thus does not invalidate the attempt conviction.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Harris, 2013 IL App (1st) 110309 (No. 1-11-0309, 11/6/13)

1. Second degree murder is defined as first degree murder accompanied by one of two mitigating factors - serious provocation or unreasonable belief in the need for self-defense. Under Illinois law, the crime of attempt second degree murder does not exist. **People v. Lopez**, 166 IL 2d 441, 655 NE 2d 864 (1995). Under **Lopez**, the failure to recognize the offense of attempt second degree murder creates the possibility that a perpetrator could be punished more severely for attempt first degree murder than if the victim had died and a second degree murder conviction resulted.

2. In 720 ILCS 5/8-4(c)(1)(E), the legislature removed this possible disparity in sentencing by providing that attempt murder carries only a Class 1 sentence if the defendant proves by a preponderance of the evidence at sentencing that at time of an attempt murder, he or she was acting under a sudden and intense passion resulting from serious provocation. Here, the court concluded that the phrase “serious provocation” carries the same meaning under §8-4(c)(1)(E) as for second degree murder. Thus, the only categories of serious provocation recognized under Illinois law are for substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

3. Defendant failed to prove by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation when he stabbed a man whom he believed was reaching for a gun from under a car seat. The court noted that defendant was not injured, was not engaged in a mutual quarrel, and in fact had no interaction at all with the victim before the stabbing occurred. Furthermore, there is no evidence of an illegal arrest or adultery. Under these circumstances, the evidence failed to show any of the recognized classes of serious provocation.

4. The court rejected the argument that the act of brandishing a deadly weapon should be held to constitute serious provocation where the offender responds in the belief that self defense is justified. The court noted that in enacting §8-4(c)(1)(E), the legislature chose to recognize only one of the mitigating factors that reduce a first degree murder to second degree - the presence of serious provocation. Had the legislature intended to also recognize an unreasonable belief in the need for self defense as a factor under §8-4(c)(1)(E), it would have done so explicitly. In light of the legislature’s failure to act, the court declined to expand the definition of “serious provocation” to include an unreasonable belief in the need for self-defense.

Defendant’s Class X sentence of eight years for attempt murder was affirmed.
(Defendant was represented by Assistant Defender Phillip Payne, Chicago.)

People v. Viramontes, 2014 IL App (1st) 130075 (No. 1-13-0075, 9/24/14)

1. Second degree murder occurs where at the time of the killing, the defendant is acting under sudden and intense passion resulting from serious provocation by the decedent or by another whom the defendant endeavors to kill when he negligently or accidentally causes the death of the decedent. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. Illinois law recognizes four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the defendant’s spouse.

Passion, no matter how extreme, is not recognized as provocation unless it fits into one of the above categories. Furthermore, mere words are not recognized as provocation even where they are abusive, aggravated, or indecent. A defendant is entitled to a second degree jury instruction where there is some evidence, even if slight, to support a claim of serious provocation.

2. The court found that as a matter of law, defendant’s discovery of his wife’s infidelity

by reading text messages and seeing nude photographs on her phone did not constitute serious provocation. Under Illinois law, a spouse's adultery constitutes provocation only where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows that discovery. The court analogized defendant's discovery of evidence of adultery on his wife's cell phone as similar to a confession of adultery by a spouse, which has been recognized as insufficient provocation to reduce first degree murder to second degree.

3. The court rejected the argument that a second degree murder instruction was justified based on mutual combat between defendant and the decedent. Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." Provocation by mutual combat will not be found if the accused retaliates in a manner that is out of proportion to the provocation. A defendant may not instigate a fight and then rely on the victim's response as evidence of mutual combat. Mutual combat will not be found if sufficient time elapsed between the alleged provocation and the homicide to permit the "voice of reason" to be heard.

Because the record showed that defendant was the aggressor and inflicted a brutal beating on the decedent, and that his actions were "completely disproportionate" to the decedent's actions of striking him in the chest, the trial court properly declined to give a second degree murder instruction based on mutual conduct.

Defendant's conviction for first degree murder was affirmed.

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§26-4(b) Instructions

People v. Washington, 2012 IL 110283 (No. 110283, 1/20/12)

1. The question of whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant's subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant's request for self-defense instructions, it was error to deny his request for second-degree murder instructions.

2. An instructional error such as the denial of a second-degree murder instruction is harmless only if it is demonstrated that the result of the trial could not have been different had the jury been properly instructed.

Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to what transpired before and after the shooting. By refusing the second-degree murder

instruction, the trial court took the determination of whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

The court affirmed the judgment of the Appellate Court reversing and remanding for a new trial.

(Defendant was represented by Rachel Moran, *pro bono*.)

People v. Wilmington, 2013 IL 112938 (No. 112938, 2/7/13)

1. Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

2. The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Billups, 404 Ill.App.3d 1, 935 N.E.2d 1046 (1st Dist. 2010) (No. 1-08-1383, 8/23/10)

In **People v. Lockett**, 82 Ill.2d 546, 413 N.E.2d 378 (1980), the Illinois Supreme Court held that both self-defense and voluntary manslaughter (now second degree murder) instructions must be given whenever there is evidence that defendant subjectively believed that his use of force was necessary.

Defendant testified that as deceased left the van in which they had been riding, he attempted to rob the defendant and his brother. When the defendant wrestled the gun from the deceased, the deceased pulled defendant's sweatshirt over his head, forcing the defendant to his knees. Defendant fired the gun in the direction of the deceased without looking, then shot the deceased in the head after the deceased loosened his grip and defendant saw the deceased fall on one knee outside the van. The defendant's brother testified that shots were fired seconds after defendant and the deceased exited the van, and that defendant admitted to him that he had the gun the whole time. The medical examiner found three wounds on the deceased: in the right chest and left hip (neither at close range) and a final contact wound in the back of his head. The court gave the jury self-defense instructions but refused second degree murder instructions.

The Appellate Court concluded that **Lockett** does not hold that a second degree murder instruction is a mandatory counterpart to a self-defense instruction. Unlike **Lockett**, a defendant's subjective belief is not an issue if the evidence only permits the jury to find defendant guilty of first degree murder because he had no subjective belief that his use of force was necessary, or not guilty by reason of self-defense because he possessed an objectively reasonable belief in self-defense. The jury in this case was required to choose between two irreconcilable versions of fact, neither of which presented an issue of imperfect self-defense. Either the shooting was justified because the deceased was committing an armed robbery, or

defendant was guilty of first degree murder. Therefore the court correctly refused the second degree murder instruction.

Relying on **People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2001), the Appellate Court rejected an argument that the jury could find second degree murder based on the final shot fired to the head. Just as the State is barred from treating defendant's conduct as multiple acts supporting multiple convictions unless the charging instrument differentiates between the acts, defendant cannot "apportion his beliefs among the separate shots he fired."

People v. Viramontes, 2014 IL App (1st) 130075 (No. 1-13-0075, 9/24/14)

1. Second degree murder occurs where at the time of the killing, the defendant is acting under sudden and intense passion resulting from serious provocation by the decedent or by another whom the defendant endeavors to kill when he negligently or accidentally causes the death of the decedent. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. Illinois law recognizes four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the defendant's spouse.

Passion, no matter how extreme, is not recognized as provocation unless it fits into one of the above categories. Furthermore, mere words are not recognized as provocation even where they are abusive, aggravated, or indecent. A defendant is entitled to a second degree jury instruction where there is some evidence, even if slight, to support a claim of serious provocation.

2. The court found that as a matter of law, defendant's discovery of his wife's infidelity by reading text messages and seeing nude photographs on her phone did not constitute serious provocation. Under Illinois law, a spouse's adultery constitutes provocation only where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows that discovery. The court analogized defendant's discovery of evidence of adultery on his wife's cell phone as similar to a confession of adultery by a spouse, which has been recognized as insufficient provocation to reduce first degree murder to second degree.

3. The court rejected the argument that a second degree murder instruction was justified based on mutual combat between defendant and the decedent. Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." Provocation by mutual combat will not be found if the accused retaliates in a manner that is out of proportion to the provocation. A defendant may not instigate a fight and then rely on the victim's response as evidence of mutual combat. Mutual combat will not be found if sufficient time elapsed between the alleged provocation and the homicide to permit the "voice of reason" to be heard.

Because the record showed that defendant was the aggressor and inflicted a brutal beating on the decedent, and that his actions were "completely disproportionate" to the decedent's actions of striking him in the chest, the trial court properly declined to give a second degree murder instruction based on mutual conduct.

Defendant's conviction for first degree murder was affirmed.

People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 (1st Dist. 2010)

1. First degree murder occurs where the defendant kills an individual without lawful justification and with intent to kill or inflict bodily harm, knowledge that his acts will cause death, or knowledge that his acts create a strong probability of death or bodily harm. Second

degree murder occurs when first degree murder was committed and the offender unreasonably believed that the circumstances justified the use of deadly force or acted under serious provocation.

2. Under **People v. Lockett**, 82 Ill.2d 546, 413 N.E.2d 378 (1980), a second degree murder instruction is required whenever there is sufficient evidence to give a self-defense instruction on a first degree murder charge. The trial court may not weigh the evidence and deny a second degree instruction based on its determination that defendant's subjective belief in the need for self-defense was reasonable or unreasonable.

The court also rejected the argument that a second degree murder instruction is required in a first degree murder case only if there is independent evidence that defendant's belief concerning the use of deadly force was unreasonable. (Rejecting **People v. Anderson**, 266 Ill.App.3d 947, 641 N.E.2d 591 (1st Dist. 1994)).

3. Because the trial court properly found that there was sufficient evidence to justify a self-defense instruction, it erred by refusing to also give defendant's tendered second degree murder instruction.

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§26-5

Involuntary Manslaughter – Reckless Homicide

§26-5(a)

Generally

People v. Almore, 241 Ill.2d 387, 948 N.E.2d 574 (2011)

Under 720 ILCS 5/9-3(d), involuntary manslaughter is a Class 3 felony for which a term of two to five years imprisonment may be ordered. Where the victim was a "family or household member," however, the offense is a Class 2 felony with an extended term of not less than three or more than 14 years. "Persons who share or formerly shared a common dwelling" are included within the definition of "family or household members." (725 ILCS 5/112A-3(3)).

1. The court concluded that by authorizing an extended term based on the decedent's status as a "family or household member," the legislature intended to capture all types of past and present "familial" relationships as well as various forms of cohabitation and shared living arrangements. Whether persons are "family or household members" by virtue of having "shared a common dwelling" is decided on specific facts of each case. The factors to be considered include: (1) the amount of time the parties resided together, (2) the nature of the living arrangements, (3) whether the parties had other living accommodations, (4) whether the parties kept personal items at the shared residence, and (5) whether the parties shared in the privileges and duties of a common residence such as contributing to household expenses and helping with maintenance. Persons who have no real connection other than occasionally sleeping under the same roof, such as occupying the same homeless shelter, do not share a common dwelling. (See **People v. Young**, 362 Ill.App.3d 843, 840 N.E.2d 825 (2d Dist. 2005)).

2. The court concluded that on this record, the two-year-old child of the defendant's girlfriend "shared a common dwelling" with the defendant. The mother and the defendant had dated for 18 months, and on several occasions lived together at her family's residence or at the defendant's temporary residence. Whenever the defendant and the mother stayed together,

the child stayed as well. Furthermore, the defendant provided child care when the mother went to work.

The court also noted that for five days preceding the child's death, the child and his mother stayed with the defendant at the latter's temporary residence. During those five days, the child and his mother slept in the same room with the defendant. In addition, the child's clothes, food, and medicine were kept at defendant's residence.

Under these circumstances, the evidence showed that the child and defendant shared a common dwelling, although that dwelling was sometimes the mother's family home and sometimes the defendant's temporary residence. Defendant's 12-year extended term for involuntary manslaughter was reinstated.

People v. Jones, 404 Ill.App.3d 734, 936 N.E.2d 1160 (1st Dist. 2010)

The difference between first degree murder and involuntary manslaughter is mental state. First degree murder is committed when one intends to kill or do great bodily harm, or knows his acts create a strong probability of death or great bodily harm. To be convicted of first degree murder, the defendant must be consciously aware that his conduct is practically certain to cause a particular result. Involuntary manslaughter occurs when one acts recklessly, i.e., consciously disregards a substantial and unjustifiable risk that circumstances exist or a result will follow, and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. A person acts recklessly when he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur.

Defendant and the deceased engaged in a fist fight that included blows to the head of the deceased. Defendant then held the deceased on the ground with his foot placed between the neck and chest of the deceased. The deceased outweighed the defendant by 130 pounds, though they were of similar height. The deceased appeared to be breathing when defendant left the scene. He died of asphyxiation. The medical examiner testified that asphyxiation could result from only 4.4 pounds of pressure being applied to the deceased's jugular vein for a minute. The pressure need not be directly applied to the vein; it could be applied to soft tissue of the front and side of the neck, which would in turn result in pressure on the blood vessels. There was no evidence regarding the length of time that defendant held the deceased on the ground with his foot. The medical examiner testified that none of the other injuries that the deceased sustained in the fight individually or collectively caused the death.

The court concluded that the defendant acted recklessly. Because the deceased outweighed the defendant, defendant would have to apply some amount of pressure on the deceased to hold him on the ground. The evidence did not support the inference that defendant knew or should have known or was aware that applying only 4.4 pounds of pressure indirectly to the jugular vein would cause asphyxiation. Defendant's act of leaving when the deceased appeared to be alive was inconsistent with the mental state for first degree murder.

The court reduced defendant's conviction from first degree murder to involuntary manslaughter and remanded for resentencing.

(Defendant was represented by Assistant Defender LaRoi Williams, Chicago.)

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011)

1. The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows

a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

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§26-5(b) **Instructions**

People v. Beasley, 2014 IL App (4th) 120774 (No. 4-12-0774, 4/25/14)

1. A defendant is entitled to a lesser-included offense instruction if the evidence at trial would allow a rational jury to find the defendant guilty of the lesser offense while acquitting him of the greater offense. The basic difference between involuntary manslaughter and first degree murder is the mental state accompanying conduct which resulted in another's death. For first degree murder, the defendant must know that his acts create a strong probability of death or great bodily harm. For involuntary manslaughter, the defendant must recklessly perform acts likely to cause death or great bodily harm.

Standing alone, defendant's testimony that he did not intend to shoot anyone does not provide a sufficient basis for giving an instruction on involuntary manslaughter. However, the court concluded that there was sufficient evidence to support an involuntary manslaughter instruction where a witness testified that defendant did not appear to be pointing the gun at any specific person before it went off, that defendant and the decedent knew each other, and that defendant would not have intentionally shot the decedent. In addition, several witnesses testified that defendant was not pointing the gun at anyone in particular when the shot was fired. The court also noted that there was a basis in the evidence to find that defendant was in a dispute with the decedent and thought the decedent was advancing and threatening to harm him. Finally, defendant testified that the gun went off accidentally and that he had an elevated sense of fear due to previous incidents in which he had been shot.

The court concluded that although the evidence supporting involuntary manslaughter was not as strong as the evidence supporting second degree murder, a rational jury could have accepted defendant's claim that he acted recklessly and did not intend to shoot the decedent. Therefore, the trial court abused its discretion by failing to instruct the jury on involuntary manslaughter. Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender, Daaron Kimmel, Springfield.)

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011)

1. The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Perry, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-1228, 3/31/11)

1. An instruction on the lesser-included offense of involuntary manslaughter is warranted when there is some credible evidence to support the instruction. Although not dispositive, certain factors are relevant to the decision whether to give the instruction: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, including the severity of the victim's injuries; and (3) whether the defendant used his bare fists or a weapon. Generally, an involuntary manslaughter instruction should not be given where the nature of the killing, demonstrated by either multiple wounds or the victim's defenselessness, shows that the defendant did not act recklessly.

The court did not err in refusing an involuntary manslaughter instruction even though the court instructed the jury on the definition of recklessness and allowed defense counsel to argue to the jury that defendant acted recklessly, rather than knowingly or intentionally. Defendant attacked the deceased with a group of eight or nine boys, severely beat the deceased for five minutes, punching and stomping on his head, even as he lay defenseless and motionless on the ground. Defendant also used a liquor bottle as a weapon. The court found that the severity and duration of the beating, resulting in 17 distinct injuries, belied defendant's argument that he would not necessarily have known of the severity of the injuries because they were internal, and thus he had no reason to suspect that they would be fatal.

2. The second paragraph of IPI Crim. 4th, No. 5.01B defines knowledge as conscious awareness that a result is practically certain to be caused by defendant's conduct. It is applicable where the offense is defined in terms of a prohibited result. A charge of first degree murder pursuant to 720 ILCS 5/9-1(a)(2) requires that defendant act with knowledge that his actions create a strong probability of death or great bodily harm to the deceased. Therefore, the second paragraph of 5.01B is applicable because the charge requires knowledge of the result of defendant's conduct.

The committee notes to 5.01B indicate that the committee took no position whether the definition should be routinely given absent a specific jury request. The Appellate Court interpreted this note to mean that "knowingly" has a plain meaning commonly understood by

jurors. The jury made no specific request for an additional instruction indicating confusion about mental states, though it did inquire whether it could find defendant guilty of another charge, such as second degree murder. Therefore, the court did not abuse its discretion in refusing the defense request for the instruction. The court also found no error because the jury otherwise received correct definitional and issues instructions on first degree murder. In addition, any error was harmless because the jury returned a valid general verdict of guilty that could be presumed to be based on the intentional murder count.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Smith, 2014 IL App (1st) 103436 (No. 1-10-3436, 7/17/14)

1. Involuntary manslaughter occurs where the defendant recklessly performs acts that are likely to cause death or great bodily harm. A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

2. The trial court did not err by failing to give an involuntary manslaughter instruction at defendant's trial for first-degree murder, attempt first-degree murder, and armed robbery. Defendant testified that he and his former girlfriend struggled over a pistol that the girlfriend was holding, and that the decedent was shot when the gun discharged during the struggle. The Appellate Court found that such testimony, if believed, would not justify an involuntary manslaughter instruction because it would have resulted in an acquittal rather than in any type of conviction.

3. Furthermore, an involuntary manslaughter instruction was not justified based on the complainant's testimony that defendant brought a gun to her home and pointed it at the decedent. Defendant argued that the jury could have believed such testimony and that the decedent was unintentionally shot while defendant and the complainant struggled over the gun.

Illinois courts consider several factors in determining whether defendant acted recklessly: (1) the brutality and duration of the offense, (2) the severity of the victim's injuries, (3) the disparity in size between the defendant and the victim, (4) whether the defendant used a weapon, and (5) whether the defendant struck multiple times. An involuntary manslaughter instruction is not warranted where the nature of the killing, as indicated by multiple wounds or the victim's defenselessness, shows that the defendant acted intentionally rather than recklessly.

The court concluded that the totality of the evidence showed that defendant acted intentionally. The decedent's injuries were severe and inflicted by a weapon used by the defendant, and a second person besides the decedent was also wounded. In addition, the fact that three bullets struck two victims "belies defendant's assertion that the gun only went off while he and [the complainant] were struggling." The court also noted that both of the victims were defenseless when defendant burst into their bedroom with a firearm and that defendant tried to break the complainant's phone to keep her from calling for help. Furthermore, defendant stole a car which belonged to the complainant's mother, fled from the scene, and used a pseudonym both at the hospital when seeking treatment for his injuries and when he was arrested.

Because the evidence indicated that defendant acted intentionally or knowingly rather than recklessly, an involuntary manslaughter instruction was not warranted.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Williams, 391 Ill.App.3d 257, 908 N.E.2d 1079 (1st Dist. 2009)

Where defendant was charged with first degree murder, and an instruction on the lesser included offense of involuntary manslaughter was requested by the defense and found to be appropriate based on the evidence, the trial court erred by giving a modified IPI instruction directing the jury to consider involuntary manslaughter only if it acquitted defendant of first degree murder.

However, the plain error rule did not apply. First, the evidence was not close. Second, Illinois Supreme Court precedent holds that the “fundamental fairness” prong of the plain error rule does not apply to an erroneous instruction concerning the order in which the jury is to consider pending offenses. (See **People v. Pastorino**, 91 Ill.2d 178, 435 N.E.2d 1144 (1982)).

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§26-6

Concealment of Homicidal Death

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§26-7

Justified Use of Force

§26-7(a)

Generally

People v. Brown, 406 Ill.App.3d 1068, 952 N.E.2d 32 (4th Dist 2011)

1. A person is entitled to act in self-defense where: (1) he or she is threatened with unlawful force, (2) the danger of harm is imminent, (3) the use of force is necessary, and (4) the person threatened is not the aggressor. It is the State’s burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, the trier of fact is free to reject a self-defense claim due to the improbability of the defendant’s account, the circumstances of the crime, the testimony of the witnesses, and witness credibility.

The court rejected defendant’s argument that the evidence was insufficient to disprove self-defense. The State presented evidence that the two decedents fled defendant’s apartment and returned only because defendant fired additional shots at the decedents’ brother. In addition, defendant fired at least 14 times resulting in 11 gun shot wounds to four victims, four of the five wounds on the decedents were fired from distances of greater than two feet, and the locations of the victim’s wounds were inconsistent with defendant’s testimony. Because conflicting evidence was presented concerning whether the defendant was the aggressor and there was a basis in the evidence for the jury to find that he was the aggressor and did not act in self-defense, the evidence supported the verdict.

2. Deadly force in defense of a dwelling is justified when: (1) the victim’s entry to a dwelling is made in a “violent, riotous, or tumultuous manner,” and (2) the defendant has an objective belief that deadly force is necessary to prevent an assault on himself or another in the dwelling. The evidence showed that defendant did not act in defense of dwelling where

there was evidence on which the jury could have found that none of the three victims was armed, the victims were shot outside defendant's dwelling as they were fleeing, and defendant became the aggressor when he pursued the three persons when they left his apartment and shot them in the hallway.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. McLennon, 2011 IL App (2d) 091299 (No. 2-09-1299, 9/22/11)

Defendant was convicted of criminal damage to property under \$300 and disorderly conduct for his actions in a hospital emergency room, where he was taken after police were called when defendant fell asleep at a restaurant. Defendant became agitated at the hospital and began screaming and "swinging" at hospital staff who said that they were going to treat him. Defendant also broke a lead wire to an EKG machine.

Defendant claimed he was acting in self-defense because he had not consented to medical treatment and because the administration of unauthorized medical care is battery. 720 ILCS 5/7-1(a) provides: "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force."

The Appellate Court held that even assuming that the administration of unauthorized medical treatment constitutes a battery, self-defense was not an authorized defense under these circumstances.

1. The plain language of §7-1 requires that the force used by the person claiming self-defense must be directed "against another." Criminal damage to property requires only that the State prove that the defendant knowingly damaged property, not that the defendant directed force against another person. Because criminal damage to property could never have as its basis behavior involving the direction of force "against another," self-defense is not available.

The court acknowledged that self-defense might be available where a criminal damage to property charge arises from damage which occurs incidentally from force which the defendant directs at another. Here, however, the force exercised by defendant was directed at the EKG wire, not other persons.

The court acknowledged defendant's argument that its opinion would give the accused an incentive to act violently toward other persons so that self-defense would be available, but held that "such issues are best directed to the legislature."

2. Similarly, self-defense could not be raised against the charge of disorderly conduct. Although defendant's conduct (clenching his fist, verbally abusing and screaming at the hospital staff and "swinging" at staff members) was directed at other persons, §7-1 states that self-defense is authorized only to defend against the "imminent use of unlawful force." Because the evidence showed that defendant engaged in the conduct which constituted disorderly conduct when emergency room personnel told him of their anticipated treatment, but before they took any action toward implementing the treatment, defendant had not been threatened with "imminent" force at the time of the offense. Thus, self-defense was unavailable.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

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§26-7(b)
Instructions

People v. Lewis, 2015 IL App (1st) 122411 (No. 1-12-2411, 2/27/15)

Self-defense is an affirmative defense. Unless the State's evidence raises an issue about self-defense, the defendant bears the burden of presenting sufficient evidence to raise the issue. A defendant is entitled to a jury instruction on self-defense if "very slight" or "some" evidence supports his theory. To raise self-defense in a first-degree murder case, the defendant must admit that he killed the decedent.

The Appellate Court held that defendant was not entitled to a jury instruction on self-defense because neither the State nor the defense presented any evidence that he acted in self-defense. The State's evidence showed that defendant shot the decedent after they argued about who should be allowed to sell shoes in the parking lot of a strip mall. Nothing about the argument, however, would have justified the shooting.

The defense witnesses testified that the decedent was armed and reached for his gun, but they also testified that another person, not defendant, shot and killed the decedent. Accordingly, neither the State nor the defense presented any evidence that defendant acted in self-defense. Instead, defendant improperly attempted to combine the State's evidence that he shot the decedent with his own evidence that he feared for his safety. But since there was no direct evidence from either side that defendant acted out of a reasonable belief in self-defense, he was not entitled to a self-defense instruction.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 (1st Dist. 2010)

1. First degree murder occurs where the defendant kills an individual without lawful justification and with intent to kill or inflict bodily harm, knowledge that his acts will cause death, or knowledge that his acts create a strong probability of death or bodily harm. Second degree murder occurs when first degree murder was committed and the offender unreasonably believed that the circumstances justified the use of deadly force or acted under serious provocation.

2. Under **People v. Lockett**, 82 Ill.2d 546, 413 N.E.2d 378 (1980), a second degree murder instruction is required whenever there is sufficient evidence to give a self-defense instruction on a first degree murder charge. The trial court may not weigh the evidence and deny a second degree instruction based on its determination that defendant's subjective belief in the need for self-defense was reasonable or unreasonable.

The court also rejected the argument that a second degree murder instruction is required in a first degree murder case only if there is independent evidence that defendant's belief concerning the use of deadly force was unreasonable. (Rejecting **People v. Anderson**, 266 Ill.App.3d 947, 641 N.E.2d 591 (1st Dist. 1994)).

3. Because the trial court properly found that there was sufficient evidence to justify a self-defense instruction, it erred by refusing to also give defendant's tendered second degree murder instruction.

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